

§ 734.5

(d) Except as provided in paragraph (a) of this section for certain computers, for all other countries not included in paragraph (b) of this section the following reexports are *not* subject to the EAR:

(1) Reexports of a foreign-made commodity incorporating controlled U.S.-origin commodities valued at 25% or less of the total value of the foreign-made commodity;

(2) Reexports of foreign-made software incorporating controlled U.S.-origin software valued at 25% or less of the total value of the foreign-made software; or

(3) Reexports of foreign technology commingled with or drawn from controlled U.S.-origin technology valued at 25% or less of the total value of the foreign technology.

(e) For purposes of determining *de minimis* levels, technology and source code used to design or produce foreign-made commodities or software are not considered to be incorporated into such foreign-made commodities or software. Commodities subject only to short supply controls are not included in calculating U.S. content.

(f) You are responsible for making the necessary calculations to determine whether the *de minimis* provisions apply to your situation. See Supplement No. 2 to part 734 for guidance regarding calculation of U.S. controlled content.

(g) See § 770.3 of the EAR for principles that apply to commingled U.S.-origin technology and software.

(h) Notwithstanding the provisions of paragraphs (c) and (d) of this section, U.S.-origin technology controlled by ECCN 9E003a.1 through a.12, and .f, and related controls, and encryption software controlled for “EI” reasons under ECCN 5D002 or encryption technology controlled for “EI” reasons under ECCN 5E002 do not lose their U.S.-origin when redrawn, used, consulted, or otherwise commingled abroad in any respect with other software or technology of any other origin. Therefore, any subsequent or similar software or technology prepared or engineered abroad for the design, construction, operation, or maintenance of any plant or equipment, or part thereof, which is based on or uses any such U.S.-origin

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software or technology is subject to the EAR.

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§ 734.5 Activities of U.S. and foreign persons subject to the EAR.

The following kinds of activities are subject to the EAR:

(a) Certain activities of U.S. persons related to the proliferation of nuclear explosive devices, chemical or biological weapons, missile technology as described in § 744.6 of the EAR, and the proliferation of chemical weapons as described in part 745 of the EAR.

(b) Activities of U.S. or foreign persons prohibited by any order issued under the EAR, including a Denial Order issued pursuant to part 766 of the EAR.

(c) Technical assistance by U.S. persons with respect to encryption commodities or software as described in § 744.9 of the EAR.

[61 FR 12746, Mar. 25, 1996, as amended at 61 FR 68578, Dec. 30, 1996; 64 FR 27141, May 18, 1999; 64 FR 47105, Aug. 30, 1999]

§ 734.6 Assistance available from BIS for determining licensing and other requirements.

(a) If you are not sure whether a commodity, software, technology, or activity is subject to the EAR, or is subject to licensing or other requirements under the EAR, you may ask BIS for an advisory opinion, classification, or a determination whether a particular item or activity is subject to the EAR. In many instances, including those where the item is specially designed, developed, configured, adapted, or modified for military application, the item may fall under the licensing jurisdiction of the Department of State and may be subject to the controls of the International Traffic in Arms Regulations (22 CFR parts 120 through 130) (ITAR). In order to determine if the Department of State has licensing jurisdiction over an item, you should

submit a request for a commodity jurisdiction determination to the Department of State, Office of Defense Trade Controls. Exporters should note that in a very limited number of cases, the categories of items may be subject to both the ITAR and the EAR. The relevant departments are working to eliminate any unnecessary overlaps that may exist.

(b) As the agency responsible for administering the EAR, BIS is the only agency that has the responsibility for determining whether an item or activity is subject to the EAR and, if so, what licensing or other requirements apply under the EAR. Such a determination only affects EAR requirements, and does not affect the applicability of any other regulatory programs.

(c) If you need help in determining BIS licensing or other requirements you may ask BIS for help by following the procedures described in §748.3 of the EAR.

§ 734.7 Published information and software.

(a) Information is “published” when it becomes generally accessible to the interested public in any form, including:

(1) Publication in periodicals, books, print, electronic, or any other media available for general distribution to any member of the public or to a community of persons interested in the subject matter, such as those in a scientific or engineering discipline, either free or at a price that does not exceed the cost of reproduction and distribution (See Supplement No. 1 to this part, Questions A(1) through A(6));

(2) Ready availability at libraries open to the public or at university libraries (See Supplement No. 1 to this part, Question A(6));

(3) Patents and open (published) patent applications available at any patent office; and

(4) Release at an open conference, meeting, seminar, trade show, or other open gathering.

(i) A conference or gathering is “open” if all technically qualified members of the public are eligible to attend and attendees are permitted to take notes or otherwise make a per-

sonal record (not necessarily a recording) of the proceedings and presentations.

(ii) All technically qualified members of the public may be considered eligible to attend a conference or other gathering notwithstanding a registration fee reasonably related to cost and reflecting an intention that all interested and technically qualified persons be able to attend, or a limitation on actual attendance, as long as attendees either are the first who have applied or are selected on the basis of relevant scientific or technical competence, experience, or responsibility (See Supplement No. 1 to this part, Questions B(1) through B(6)).

(iii) “Publication” includes submission of papers to domestic or foreign editors or reviewers of journals, or to organizers of open conferences or other open gatherings, with the understanding that the papers will be made publicly available if favorably received. (See Supplement No. 1 to this part, Questions A(1) and A(3)).

(b) Software and information is published when it is available for general distribution either for free or at a price that does not exceed the cost of reproduction and distribution. See Supplement No. 1 to this part, Questions G(1) through G(3).

(c) Notwithstanding paragraphs (a) and (b) of this section, note that encryption software controlled under ECCN 5D002 for “EI” reasons on the Commerce Control List and mass market encryption software with symmetric key length exceeding 64-bits controlled under ECCN 5D992 remain subject to the EAR. See §740.13(e) of the EAR for certain exports and reexports under license exception.

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§ 734.8 Information resulting from fundamental research.

(a) *Fundamental research.* Paragraphs (b) through (d) of this section and §734.11 of this part provide specific rules that will be used to determine whether research in particular institutional contexts qualifies as “fundamental research”. The intent behind